FILE COPY

U.S.
D
MAY 4 1959
S. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 822.

ROBERT G. ERRINGTON, *Petitioner*,

vs.

STATE OF MISSOURI EX REL. WILLIAM A. COLLET, PROSECUTOR IN AND FOR JACKSON COUNTY, MISSOURI.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

BRIEF FOR STATE OF MISSOURI EX REL. WILLIAM A. COLLET IN OPPOSITION.

PHINEAS ROSENBERG,
JOE E. BURRIS,
620 R. A. Long Building,
Kansas City, Missouri,
Attorneys for State of Missouri ex rel. William A. Collet.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

INDEX

Opinion Below 1
Jurisdiction 2
Statutes Involved 2
Questions Presented 3
Statement of the Case 3

Argument—

1. The Scope of the Statutes Involved 3
2. Limitations upon the State in the Exercise of the Police Power 4
3. The Question Presented to and Decided by the State Court Does Not Invoke This Court's Jurisdiction 4
4. Petitioner's Contentions 6

Conclusion 8

Appendix—

Statutes Involved A1

Table of Cases

Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 75 S. Ct. 461 5
Shelley v. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161 5
Watson v. State of Maryland, 218 U.S. 173, 30 S. Ct. 644 ..... 4, 6
Williams v. State of Arkansas, 217 U.S. 79, 30 S. Ct. 492 4
Louisiana State Board of Medical Examiners v. Fife, 162 La. 681, 111 58, affirmed 274 U.S. 720, 47 S. Ct. 590, 71 L. Ed. 1324 4
Dent v. State of West Virginia, 129 U.S. 114, 9 S. Ct. 231 ..... 4, 7

Collins v. State of Texas, 223 U.S. 288, 32 S. Ct. 286 4, 6
Hitchcock et al. v. Collenberg et al., 140 F. Supp. 894, affirmed 353 U.S. 919, 77 S. Ct. 679 4, 6, 7
Dantzler et al. v. Callison, 94 S.E.2d 177. Dismissed for want of substantial federal questions, 352 U.S. 939, 77 S. Ct. 263 4, 7
Wilson v. Cook, 327 U.S. 474, 66 S. Ct. 663, 90 L. Ed. 793 5
Hunter Co. v. McHugh, 320 U.S. 222, 64 S. Ct. 19, 88 L. Ed. 1553 5
McGoldrick v. Compagnie Generale Transatlantique, 309 U.S. 430, 60 S. Ct. 670, 84 L. Ed. 849 5
Ward & Gow v. Himan Krinsky, 259 U.S. 503, 66 L. Ed. 1033, 42 S. Ct. 529 6
Speiser v. Randall, 357 U.S. 513, 78 S. Ct. 1332 6
England v. Louisiana State Board of Medical Examiners, 259 F.2d 626 7
Douglas v. Noble, 261 U.S. 165, 43 S. Ct. 303 7
Graves v. State of Minnesota, 272 U.S. 425, 47 S. Ct. 122 7

STATUTES CITED

Sec. 334.010, Missouri Revised Statutes 1949, Vol. 1, p. 2621 2, A1
Sec. 334.030, Missouri Revised Statutes 1949, Vol. 1, p. 2621 2, A1
Sec. 334.040, Missouri Revised Statutes 1949, Vol. 1, p. 2621-2622 2, A2
Sec. 334.150, Missouri Revised Statutes 1949, Vol. 1, p. 2625-2626 2, A4

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 822.

ROBERT G. ERRINGTON, *Petitioner*,

vs.

STATE OF MISSOURI EX REL. WILLIAM A. COLLET, PROSECUTOR IN AND FOR JACKSON COUNTY, MISSOURI.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI.

BRIEF FOR STATE OF MISSOURI EX REL. WILLIAM A. COLLET IN OPPOSITION.

OPINION BELOW.

The opinion of the Missouri Supreme Court which petitioner seeks to overturn is reported at 317 S.W.2d 326.

JURISDICTION.

The court is without jurisdiction of the petition herein because:

1. Petitioner seeks to invoke the jurisdiction of this court under the provisions of Title 28, U.S.C.A., Sections 1254-1257 to review a judgment of the Supreme Court of Missouri construing state statutes without making a direct attack of unconstitutionality upon the state statutes involved in that judgment.

2. Petitioner's claim of right to relief rests upon contentions that the Missouri court of last resort by its construction of state statutes has erroneously made him subject to those statutes.

3. The construction of state statutes by a state court of last resort is binding upon the Supreme Court of the United States.

4. There is no federal question presented by the petition.

STATUTES INVOLVED.

Sec. 334.010, Missouri Revised Statutes 1949, Vol. 1, p. 2621. See Appendix.

Sec. 334.030, Missouri Revised Statutes 1949, Vol. 1, p. 2621. See Appendix.

Sec. 334.040, Missouri Revised Statutes 1949, Vol. 1, p. 2621-2622. See Appendix.

Sec. 334.150, Missouri Revised Statutes 1949, Vol. 1, p. 2625-2626. See Appendix.

QUESTIONS PRESENTED.

The essence of the Questions Presented by the petition is whether or not the Missouri Supreme Court has correctly construed the state statutes involved in its judgment.

Petitioner contends (a) that the state statutes involved in the court's judgment do not apply to him or to his profession (Naturopathy) because naturopathy is not specifically mentioned in those statutes and that the court by its construction of those statutes incorrectly held to the contrary and (b) that such a construction of the state statutes deprives petitioner of a vested right to practice his chosen profession free from the regulation of those statutes and (c) that such a construction contravenes Section 1 of the 14th Amendment to the Constitution of the United States.

STATEMENT OF THE CASE.

Respondent adopts petitioner's statement.

ARGUMENT.

1. The Scope of the Statutes Involved.

The State Statutes involved in and upon which rests the judgment of the State Court (Appx. A1-A5) are regulatory of the practice of medicine and surgery and the treatment of the sick. Those statutes do not in any sense prohibit, as such, the practice of medicine, surgery, Naturopathy or any other method, principle or school of thought utilized in the treatment of the sick, infirm of body and mind. The statutes simply prohibit any one from practicing medicine and surgery or treating the sick and infirm of body and mind without first obtaining a license which it-

self bespeaks that the holder has demonstrated that he possesses the moral and educational fitness prescribed by the state legislature as essential and prerequisite to so practice and treat.

2. Limitations upon the State in the Exercise of the Police Power.

The only limitation upon the state in the exercise of the police power when enacting regulatory measures to protect the public health and welfare is that such regulations not be so unreasonable and extravagant as to bear no reasonable relation to the subjects of such legislation. *Watson v. State of Maryland*, 218 U.S. 173, 30 S. Ct. 644; *Williams v. State of Arkansas*, 217 U.S. 79, 30 S. Ct. 492; *Louisiana State Board of Medical Examiners v. Fife*, 162 La. 681, 111 So. 58 affirmed 274 U.S. 720, 47 S. Ct. 590, 71 L. Ed. 1324; *Dent v. West Virginia*, 9 S. Ct. 233, 129 U.S. 114.

The validity of statutes similar to those presently involved has been so explicitly foreclosed by prior decisions of this court as to leave the question devoid of substance and wholly inadequate to invoke this court's jurisdiction. *Dent v. State of West Virginia*, 129 U.S. 114, 9 S. Ct. 231; *Collins v. State of Texas*, 223 U.S. 288, 32 S. Ct. 286; *Hitchcock et al. v. Collenberg et al.*, 140 F. Supp. 894, affirmed 353 U.S. 919, 77 S. Ct. 679; *Dantzler et al. v. Callison*, 94 S.E.2d 177. Dismissed for want of substantial federal questions, 352 U.S. 939, 77 S. Ct. 263.

3. The Question Presented to and Decided by the State Court Does Not Invoke This Court's Jurisdiction.

That which was presented to and passed upon by the state court is stated by the court as follows:

> "Defendant's position, as we read this record, is that he is a naturopathic physician or doctor; that the practice of naturopathy was lawful at common law and is lawful under Chapter 334, our Medical Practice act; that regulating the practice of naturopathy contravenes the 14th Amendment to the Constitution of the United States by depriving defendant of the inalienable right to follow a common occupation, and that plaintiff is not entitled to injunctive relief."
>
> (Appendix to Petition p. 6 and 7.)

Apropos to this contention we quote the language of Mr. Justice Douglas in *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 75 S. Ct. 461:

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."

Petitioner presently, by his petition herein, seeks adjudication of questions which the State Court did not pass upon nor did it have the opportunity to do so. Such questions are not now properly before the court. *Shelley v. Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161. Furthermore, the question which was presented to the State Court and passed upon by it as noted *supra*, was not the unconstitutionality of the state statutes involved but whether petitioner by his acts and conduct was within the scope of those statutes.

In order to support jurisdiction in this court the validity of the state statute by constitutional standards must be either presented to or decided by the state court. *Wilson v. Cook*, 327 U.S. 474, 66 S. Ct. 663, 90 L. Ed. 793; *Hunter Co. v. McHugh*, 320 U.S. 222, 64 S. Ct. 19, 88 L. Ed. 1553; *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 60 S. Ct. 670, 84 L. Ed. 849.

The judgment and opinion of the state court is simply one construing state statutes and is binding upon this court however out of harmony or contrary to what it might have decided had the issues presented for decision been initially submitted to it. *Ward & Gow v. Himan Krinsky*, 259 U.S. 503, 66 L. Ed. 1033, 42 S. Ct. 529; *Collins v. State of Texas*, 223 U.S. 288, 32 S. Ct. 286; *Speiser v. Randall*, 357 U.S. 513, 78 S. Ct. 1332; *Watson v. Maryland*, 218 U.S. 173, 30 S. Ct. 614; *Hitchcock et al. v. Collenberg*, 140 F. Supp. 894, affirmed 353 U.S. 919, 77 S. Ct. 679.

4. Petitioner's Contentions.

(a) Petitioner says that the practice of naturopathy was permitted at common law and Missouri has never by statute prohibited or regulated the practice thereof (by name) and argues that until that is done he has a constitutional (inalienable) right to continue his practice without interference by the courts. It should be observed that petitioner at the trial of the case made no attempt to establish by evidence or otherwise any distinction between what he calls the practice of naturopathy and the practice of medicine and the treatment of the sick, etc., which is regulated in Missouri. He, at the trial and now, rests his contention upon the bare pseudonym "naturopathy", without explanation of what it is or what he does in the practice of it.

Ironically, the Missouri Supreme Court found as a fact from the evidence in the case that what petitioner was in fact doing fell within the state statutes regulating the practice of medicine and surgery and the treatment of the sick, etc. (Petitioner's Appendix 9). It is there said:

> "Clearly, what defendant was doing was within the prohibitions of our Medical Practice Act."

This contention of petitioner has been so explicitly foreclosed by the prior decisions of this Court as to leave it

devoid of all substance. No one has an absolute right to practice Medicine, Osteopathy, Chiropractic, or any of the other healing arts or cults. *England v. Louisiana State Board of Medical Examiners*, 259 F.2d 626; *Dent v. West Virginia*, 9 S. Ct. 231, 129 U.S. 114; *Douglas v. Noble*, 261 U.S. 165, 43 S. Ct. 303; *Graves v. State of Minnesota*, 272 U.S. 425, 47 S. Ct. 122; *Hitchcock v. Collenberg*, 140 F. Supp. 894, affirmed *per curiam*, 353 U.S. 919, 77 S. Ct. 679; *Dantzler v. Callison*, 94 S.E.2d 177, 352 U.S. 939, 77 S. Ct. 263.

The fact that Missouri has by statute recognized and made exceptions for some of the more limited branches of the healing arts, such as Osteopathy, Chiropractics, dentistry, Chiropody, and refused the same consideration to Naturopathy is inadequate to demonstrate a denial of equal protection. *Hitchcock et al. v. Collenberg*, 140 F. Supp. 894, affirmed 353 U.S. 919, 77 S. Ct. 679; *Dantzler v. Callison*, 94 S.E.2d 177, appeal dismissed for want of substantial federal question 352 U.S. 939, 77 S. Ct. 263.

No useful purposes can be served by discussing further any subsidiary contentions made by petitioner as all have been so explicitly put at rest in the cases heretofore cited as to leave them devoid of all substance and make them frivolous.

CONCLUSION.

The decision of the Supreme Court of Missouri rests on sound and constitutional grounds, is correct, and no question warranting review is presented by the petition and the writ of certiorari should be denied.

Respectfully submitted,

PHINEAS ROSENBERG,
JOE E. BURRIS,
620 R. A. Long Building,
Kansas City, Missouri,
Attorneys for State of Missouri ex rel. William A. Collet.

APPENDIX.

Statutes Involved.

From Missouri Revised Statutes 1949:

334.010. Practitioner shall be registered physician.

"It shall be unlawful for any person not now a registered physician within the meaning of the law to practice medicine or surgery in any of its departments, or to profess to cure and attempt to treat the sick and others afflicted with bodily or mental infirmities, or engage in the practice of mid-wifery in the state of Missouri, except as herein provided (9981)."

334.030. Practice of medicine without license prohibited—forgery of license—penalties.

"1. Any person practicing medicine or surgery in this state, and any person attempting to treat the sick or others afflicted with bodily or mental infirmities, and any person representing or advertising himself by any means or through any medium whatsoever, or in any manner whatsoever, so as to indicate that he is authorized to or does practice medicine or surgery in this state, or that he is authorized to or does treat the sick or others afflicted with bodily or mental infirmities, without a license from the state board of medical examiners shall, upon conviction, be adjudged guilty of a misdemeanor for each and every offense; provided, that physicians registered on or prior to March 1, 1901, shall be regarded for every purpose herein as licensees and registered physicians under the provisions of this law.

"2. Any person filing or attempting to file as his own, a license of another or a forged affidavit of identification, shall be guilty of a felony and upon convic-

tion thereof, shall be subjected to such fine and imprisonment as are made and provided by the statutes of this state for the crime of forgery in the second degree.

"3. Upon receiving information that any provision of this section has been or is being violated, the secretary of the state board of medical examiners shall investigate the matter and upon probable cause appearing, shall, under the direction of the board, file a complaint with the prosecuting or circuit attorney of the county or city where the alleged offense occurred (9988, A. L. 1945, p. 1147, A. 1949, H. B. 2073):".

334.040. Examination—subjects to be passed—grade —recognition of certificates of other states.

"1. All persons desiring to practice medicine or surgery in this state, or to treat the sick or afflicted, as provided in section 334.010, shall appear before the state board of medical examiners at such time and place as the board may direct and there shall be examined as to their fitness to engage in such practice.

"2. All persons applying for examination shall make application in writing to the secretary of the board, at least thirty days before the date set for said examination by the state board of medical examiners. They shall furnish satisfactory evidence of their preliminary qualifications, to wit: A certificate of graduation from an accredited high school, or its equivalent, and satisfactory evidence of completion of pre-medical education consisting of a minimum of sixty semester hours of college credit in acceptable subjects from a reputable college or university approved by the board. They shall also furnish satisfactory evidence of having attended throughout at least four terms of thirty-two weeks of actual instruction in each term and of having received a diploma from some reputable medical college that enforces requirements of four terms of thirty-two weeks of actual instruction in each term, including two

years' experience in operative and hospital work at time of graduation; provided, that the time of graduation has been since March 12, 1901, and two years' requirements if the date of the graduation is prior to March 12, 1901, and shall also furnish evidence of good moral character.

"3. The medical examination except that part which is practical, to be in writing and the questions and answers shall be kept on file by the state board of medical examiners, subject to public inspection, and shall be of elementary and practical character, but sufficiently strict to test the qualifications of the candidate as a practitioner, and shall embrace the subjects of anatomy, chemistry, physiology, therapeutics, obstetrics, gynecology, surgery, practice of medicine. bacteriology, medical jurisprudence and hygiene, and such other branches as the state board may direct; provided, that each applicant for license shall have two hours if necessary during which to answer the usual number of questions asked on each branch examined upon.

"4. The candidate shall be required to attain an average of seventy-five per cent of all subjects examined on, provided that he must not fall below fifty per cent on any one subject, before being granted a license; provided, however, that the examination of any applicant in therapeutics shall be conducted by the member or members of the said board who represent the system of medicine of which said applicant has been a student. If there shall be no representative of the school or system of which the applicant has been a student, the examination in therapeutics shall be conducted by an examiner appointed for that purpose by the governor of Missouri, but all examination other than that in therapeutics shall be conducted as heretofore provided in this chapter.

"5. The state board of medical examiners shall issue to such persons as they shall find upon examina-

tion to possess the requisite qualifications, a license to practice medicine and surgery in accordance with the provisions of this chapter, and the state board of medical examiners shall not be permitted to favor any particular school or system of medicine but all applicants shall be subjected to the same examination and the same degree of proficiency shall be required of all; provided, that in determining the qualifications necessary for registration as a qualified physician the state board of medical examiners may, at its discretion, accept the certificate of the National Board of Medical Examiners of the United States, chartered under the laws of the District of Columbia, in lieu of and as equivalent to its own professional examination. Every applicant for a license upon the basis of such certificate shall, upon making application showing necessary qualifications, as above set out, be required to pay the same fee required of applicants to take the examination before the board.

"6. And it is further provided that the said state board of medical examiners may under the regulations established by the board admit without examination legally qualified practitioners of medicine who hold certificates to practice medicine in any state or territory of the United States or the District of Columbia with equal educational requirements to the state of Missouri and that extend like privileges to legally qualified practitioners from this state upon the applicant paying a fee of fifty dollars (9983, A. L. 1941, p. 418, A. L. 1945, p. 1147)."

334.150. Sections 334.010 to 334.180 not applicable to certain persons.

"It is not intended by sections 334.010 to 334.180 to prohibit gratuitous service to and treatment of the afflicted, and sections 334.010 to 334.180 shall not apply to commissioned surgeons of the United States army, navy, and United States public health service while in the performance of their official duties, nor to any

licensed practitioner of medicine and surgery in a border state attending the sick in this state; provided, he does not maintain an office or appointed place to meet patients or receive calls within the limits of this state; and provided, that such practitioner comply with the statutes of Missouri and the rules and regulations of the department of public health and welfare relating to the reports of births, deaths and contagious diseases, nor shall said section apply to the provisions of chapter 337, RSMo 1949. And sections 334.010 to 334.180 shall not apply to persons who endeavor to cure or prevent disease or suffering by spiritual means or prayer; provided, that quarantine regulations relating to contagious disease are not infringed upon; provided further, that no provision of this section shall be construed or held to in any way with the enforcement of the rules and regulations adopted and approved by the division of health of the state department of public health and welfare or any municipality under the laws of this state for the control of infectious or contagious diseases (9992)."